Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

YU HUA JIN AQUINO, Plaintiff, vs. DELORES SAN NICOLAS, Individually and in her Official Capacity as Secretary of Corrections, GREGORY F. CASTRO, Individually and in his Official Capacity as Director of Corrections, KATHLEEN BUSENKELL, Individually and in her Official Capacity as an Assistant Attorney General, COMMONWEALTH OF NORTHERN MARIANA ISLANDS, and DO'ES 1-10, Defendants.	No. C 09-0042 **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS**

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I. INTRODUCTION AND BACKGROUND

A. Factual Background[1]

Plaintiff Yu Hua Jin Aquino is a citizen of the People's Republic of China, residing in Saipan, Commonwealth of the Northern Mariana Islands [2]. She was arrested on April

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[1] "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556, 127 S.Ct. 1955 (2007), in turn citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)); *see Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold and Easement in the Cloverly Subterranean, Geological Formation*, 524 F.3d 1090, 1096 (9th Cir. 2008) ("To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) . . . [w]e accept all factual allegations in the complaint as true. . . .") (citing *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir.2007) (internal quotation marks and citation omitted)). Based on the above standards, the court accepts the factual background as true, as drawn from Aquino's complaint, only for the purpose of considering the defendants' motions to dismiss.

[2] Defendant Commonwealth of the Northern Mariana Islands ("CNMI") is the government organized for, and exercising general authority over, the Northern Mariana (continued…)

13, 2008, and pleaded guilty to charges of possession of an illicit substance. Pursuant to the Amended Judgment and Commitment Order entered November 5, 2008, Aquino was to complete a one year term of incarceration and be released from criminal custody on April 13, 2009, at 8:00 a.m.[3] The Amended Judgment and Commitment Order further provided that she was to be released immediately to the CNMI or Federal Immigration Officials for immediate removal from the CNMI. Aquino signed a stipulation to deportation, and a Superior Court judge entered an Order of Deportation in her criminal case.

Aquino was not deported on April 13, 2009, as had been stipulated to and ordered. Rather, she was held in continuing custody and reclassified as an immigration detainee, without being taken before a judge to have her continued detention reviewed. During the time of her continued detention, CNMI authorities were in possession of her passport. On May 15, 2009, Defendant Kathleen Busenkell[4] filed Civil Action No. 09-0194 in the Commonwealth Superior Court, which included the stipulation to deportation and the Order of Deportation. On July 9, 2009, Aquino privately retained counsel, who was able

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[2](…continued)
Islands. Aquino alleges that CNMI accepts liability for the acts and omissions of its officers and employees pursuant to CNMI Public Law 15-22.

[3] Defendant Delores San Nicolas is the Commissioner of the CNMI Department of Corrections, with general overall operational responsibility for the facility at which Aquino was incarcerated. Defendant Gregory Castro is the Director of the CNMI Department of Corrections, with secondary overall operational responsibility for the facility at which Aquino was incarcerated.

[4] Defendant Busenkell is the Assistant Attorney General for CNMI, with the principal responsibility for immigration cases, specifically deportations.

to cause her release the following day, July 10, 2009—88 days after Aquino's stipulated to and ordered release date of April 13, 2009.

B. Procedural Background

On November 23, 2009, Aquino filed her Complaint (docket no. 1) in this case, which alleges four claims. Aquino's first claim alleges that the above named defendants violated her Due Process rights under the Fourteenth Amendment of the United States Constitution[5] and the Commonwealth Covenant[6], entitling her to remedies under 42 U.S.C. § 1983[7]. Aquino's second claim is for punitive damages, as the defendants'

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[5] The Fourteenth Amendment of the United States Constitution provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[6] The Fourteenth Amendment is applicable to the Northern Mariana Islands as if it were one of the several states. Covenant art. V, § 501.

[7] Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

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actions were allegedly willful, wanton, reckless, or with actual malice. In Aquino's third claim, she alleges intentional infliction of emotional distress, as she argues the defendants' actions were extreme and outrageous, intended to cause her severe emotional distress, and did, in fact, proximately cause her severe emotional distress. Lastly, Aquino asserts a fourth claim, for attorneys fees, pursuant to 42 U.S.C. § 1988.

On January 25, 2010, Defendant Kathleen Busenkell filed her Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (docket no. 4) and Defendants Delores San Nicolas, Gregory Castro, and Commonwealth of the Northern Mariana Islands ("CNMI") filed their Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) (docket no. 5). In Busenkell's motion, she argues that Aquino did not suffer any infringement of her rights—because Aquino has no right to a bail hearing—and has not alleged that Busenkell was responsible for any alleged infringement. Busenkell claims that she is entitled to absolute immunity to this suit, as the attorney responsible for prosecuting the case. If the court does not find that Busenkell is entitled to absolute immunity, she claims that she is entitled to qualified immunity. Busenkell also alleges that this court can decline to exercise supplemental jurisdiction over Aquino's claims that do not raise a

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[7](…continued)

> liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

federal question, if there is no diversity jurisdiction. Lastly, Busenkell argues that Aquino's claims for attorney fees and punitive damages are not causes of action but, instead, are only forms of relief to which she may be entitled.

The motion to dismiss filed by San Nicolas, Castro, and the CNMI also raises several arguments in support of the motion. First, these defendants claim that San Nicolas, Castro, and CNMI are not persons under § 1983. Second, these defendants allege that Aquino's claim under § 1983 and claim for intentional infliction of emotional distress cannot be maintained against San Nicolas and Castro because they are entitled to qualified immunity. Third, these defendants claim that their conduct was permissible under *Zadvydas v. Davis*, 533 U.S. 678, 701, 121 S.Ct. 2491, 2505 (2001) and *Demore v. Kim*, 538 U.S. 510, 123 S.Ct. 1708, 1721-22, 155 L.Ed.2d 724 (2003), and, therefore, it was not "outrageous." Fourth, these defendants claim that CNMI retained sovereign immunity from Aquino's claim of intentional infliction of emotional distress, pursuant to 7 CMC § 2204[8]. Fifth, these defendants claim that this court should not exercise jurisdiction over

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[8] The Government Liability Act of 1983, 7 CMC § 2204, provides that:

> The government is not liable for the following claims: (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Commonwealth agency or an employee of the government, whether or not the discretion is abused; (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander misrepresentation, deceit, or interference with contractual rights; (c) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary

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the intentional infliction of emotional distress claim and that it should be dismissed pursuant to 28 U.S.C. § 1367(c)[9].

On March 4, 2010, Aquino filed her Opposition to Defendants' Motions to Dismiss (docket no. 11). In her opposition, Aquino claims that the court has subject matter jurisdiction over all of her claims against all of the defendants. Aquino also argues that Busenkell is not entitled to any form of immunity, because she acted as a direct participant in controlling and directing operational affairs of the CNMI Division of Immigration. None of the defendants are entitled to qualified immunity, according to Aquino, because they allegedly violated the United States Constitution, CNMI law, a court order, and the

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[8](…continued)

> system; (d) any claim based on denial of, or failure to make, a medical referral to a medical facility outside the Commonwealth; (e) Any claim based on the detention of any goods or merchandise by any law enforcement, excise or customs officer; and (f) The imposition or establishment of a quarantine.

7 CMC § 2204.

[9] "[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 13 U.S.C. § 1367(a). However:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

13 U.S.C. § 1367(c).

plea agreement. Lastly, Aquino claims that her CNMI claims have merit because *Zadvydas* and *Demore* are inapplicable, CNMI's sovereign immunity is abrogated by § 1983, and that the court has diversity jurisdiction over her intentional infliction of emotional distress claim because she is a Chinese national and no other party is a Chinese national.

On March 18, 2010, San Nicolas, Castro, and CNMI filed their Reply Memorandum in Further Support of Motion to Dismiss (docket no. 12). These defendants argue, first, that Aquino's claims against CNMI should be dismissed from the suit, due to Aquino's admission that it is not a person under § 1983. These defendants also claim that CNMI, and San Nicolas and Castro in their official capacities, should be dismissed from the case because Aquino concedes that she is not seeking damages from CNMI or San Nicolas and Castro in their official capacities. According to these defendants, Aquino has not properly requested any other forms of relief. Even if Aquino had properly requested injunctive relief, these defendants claim that the United States government has assumed the deportation function from CNMI. Concerning the remaining claims against San Nicolas and Castro, the defendants claim that they are entitled to qualified immunity against those claims. These defendants also claim that Aquino's claim for intentional infliction of emotional distress should be dismissed, because none of the defendants' actions were "outrageous." Lastly, these defendants argue that Aquino's claim for intentional infliction of emotional distress cannot be maintained against CNMI because it has retained sovereign immunity from the claim, under 7 CMC § 2204.

Busenkell filed her Reply to the Opposition to the Motion to Dismiss (docket no. 13), on March 18, 2010. Busenkell, first, claims that Aquino did not suffer any infringement of a protected right and has not alleged that Busenkell was responsible for any alleged infringement. Busenkell maintains that she is entitled to absolute immunity but,

if the court is reluctant to grant absolute immunity, that she is also entitled to qualified immunity. Busenkell also repeats her claim that this court should not exercise supplemental jurisdiction over Aquino's intentional infliction of emotional distress claim. Even if diversity exists, Busenkell claims that Aquino did not plead that ground for jurisdiction in her complaint and should be forced to re-file. Busenkell also addresses a conflict of interest issue not currently before the court.

On April 6, 2010, Aquino filed her Surreply (docket no. 16). Aquino, first, discussed the conflict of interest issue. Second, Aquino repeated her position, and arguments, concerning the alleged inapplicability of *Zadvydas* and *Demore* and applicability of *Gerstein*. Third, Aquino argued that Busenkell is not entitled to immunity because her actions went far beyond functioning as an immigration prosecutor to be actively involved in the operational aspects of the immigration division. Lastly, Aquino claims that the defendants' conduct was outrageous and that San Nicolas, Castro, and Busenkell are being sued for their actions, while CNMI is liable for their actions due to CNMI Public Law 15-22[10].

II. RULE 12(b)(6) STANDARDS

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss on the basis of "failure to state a claim upon which relief can be granted."[11] FED.

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[10] Public Law 15-22 provides for limited tort liability to CNMI under certain circumstances. *See* Commonwealth Employees' Liability Reform and Tort Compensation Act of 2006, Pub. L. No. 15-22 (2006).

[11] Effective December 1, 2007, Federal Rule of Civil Procedure 12 was "amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FED. R. CIV. P. 12, (continued…)

R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court revisited the standards for determining whether factual allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain,* 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) (" [T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the ASSUMPTION THAT ALL THE allegations in the complaint are true (even if doubtful in fact), *see*, *e.g.*, *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002);

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[11] (…continued)
advisory committee's note. The advisory committee notes make it clear that the "changes are to be stylistic only." *Id.* The stylistic changes to Rule 12(b)(6) are in fact minimal, as Rule 12(b)(6) continues to authorize a motion to dismiss "for failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Thus, this amendment did not change the standards for a Rule 12(b)(6) motion.

> *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic, 550 U.S. at 555-56 (footnote omitted); *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (instructing that "short and plain statement" requirement "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation."). Thus, the Ninth Circuit Court of Appeals has recognized that, "[a] complaint may survive a motion to dismiss if, taking all well-pleaded factual allegations as true, it contains 'enough facts to state a claim to relief that is plausible on its face.'" *Coto Settlement v. Eisenberg,* 593 F.3d 1031, 1034 (9th Cir. 2010) (quoting *Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), in turn quoting *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929). The Ninth Circuit Court of Appeals has also stated that the court does "not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Id.* (quoting *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009), in turn citing *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d 972, 975 (9th Cir. 2007)); *see also Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (The court "need not accept Plaintiffs' unwarranted conclusion in reviewing a motion to dismiss.") (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955, 167 L.Ed.2d 929, for the proposition that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"(internal quotation marks and alterations omitted); *Iqbal*, 129 S.Ct. at 1953, 173 L.Ed.2d 868, claiming that it held "that the pleading requirements stated in *Twombly* apply in all civil cases"); and *Adams v. Johnson*,

355 F.3d 1179, 1183 (9th Cir.2004), for the proposition that "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss").

III. LEGAL ANALYSIS

A. Aquino's § 1983 Claim and Qualified Immunity

Aquino brings an action pursuant to 42 U.S.C. § 1983 for her "continued detention beyond the term of her sentence, without review of that detention by a judge," which she alleges deprived her of her "right under the Fourteenth Amendment to the [United States] Constitution and the Commonwealth Covenant to due process of law." Docket no. 1. The defendants have filed motions to dismiss, which both seek dismissal of this claim on, at least, the grounds that they are entitled to qualified immunity.[12]

The defendants[13] argue that they are entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S.Ct. 808,

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[12] The court will consider whether defendants San Nicolas, Castro, and Busenkell, in their individual capacities, are entitled to qualified immunity. *See Magana v. Com. of the Northern Mariana Islands*, 107 F.3d 1436, 1447 (9th Cir. 1997) ("We have made clear that although '[n]either the CNMI nor its officers acting in their official capacity can be sued under § 1983,' officers may be sued under that statute in their individual capacities.") (citing *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir.1992)).

[13] The court will consider the arguments in both motions to dismiss, and refer to all of the defendants collectively, in its discussion of the defendants' request for qualified immunity.

815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. In fact, "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id*. (citing *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (KENNEDY, J., dissenting) in turn citing *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)). The United States Supreme Court has also explained:

> Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that " 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam).

Id.; *see also Brooks v. City of Seattle*, 599 F.3d 1018, 1022 (9th Cir. 2010) ("Qualified immunity entitles the Officers 'not to stand trial or face the other burdens of litigation' on the § 1983 claim, provided their conduct did not violate a clearly established federal right.") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

The Ninth Circuit Court of Appeals has recently repeated the two part qualified immunity inquiry: "The qualified immunity inquiry asks two questions: (1) was there a violation of a constitutional right, and, if so, then (2) was the right at issue 'clearly established' such that it would have been clear to a reasonable officer that his conduct was unlawful in that situation?" *Brooks*, 599 F.3d at 1022 (citing *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), overruled on other grounds by *Pearson*, 129 S.Ct. 808, 172 L.Ed.2d 565). "If the [officials'] actions do not amount to a constitutional violation, the violation was not clearly established, or their actions reflected a reasonable mistake about what the law requires, they are entitled to qualified immunity." *Id.* (citing *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir.2007)); *Pearson*, 129 S.Ct. at 815 ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

1. Arguments of the parties

The defendants claim that Aquino's detention between April 13, 2009, and July 10, 2009, did not violate her constitutional right to due process. Rather, the defendants argue that the United States Supreme Court has explained that "[d]etention during removal proceedings is a constitutionally permissible part of that process," docket no. 4 (quoting *Demore v. Kim*, 538 U.S. 510, 123 S.Ct. 1708, 1721-22, 155 L.Ed.2d 724 (2003)); docket no. 5 (citing same), and a six-month detention for deportation purposes is presumed reasonable and will not violate the alien's Constitutional Due Process rights. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 701, 121 S.Ct. 2491, 2505 (2001); docket no. 5 (citing same). The defendants also claim that Aquino had no constitutional or statutory right to

a bail hearing during this period of detention. The defendants recognize that a defendant is entitled to appear before a magistrate following a warrantless arrest but claim that Aquino had served her sentence and was in the process of being deported—the defendants allege that the delay in deportation was a result of Aquino's passport being invalid. As a result, the defendants argue that Aquino's three month pre-removal detention did not, as a matter of law, violate her Due Process rights.

Aquino claims that she was being held in custody without an arrest warrant. As a result, Aquino argues that she should have been brought before a magistrate for review of her continued detention. In support of this argument, Aquino cites multiple cases that concern the requirement of a judicial determination of probable cause before extended periods of detention. *See* docket no. 11 (citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975)). According to Aquino, *Zadvydas* and *Demore* are inapplicable because they are based on a provision of the United States immigration law, which expressly provides for a 90 day removal period. Aquino argues CNMI controlled its immigration during the time that these events took place and that it has no authorization for such detention that is comparable to that of United States immigration law. In addition, Aquino claims that her detention was in violation of CNMI law. Lastly, Aquino claims that the defendants' actions were in violation of the court's order requiring her immediate deportation.

In their reply briefs, the defendants argue that Aquino was not entitled to a bail hearing under any CNMI statute and that it is not required by *Zadvydas*. The defendants also claim that *Zadvydas* and *Demore's* application is not restricted to federal statutes. Instead, it allegedly provides a rule that is applicable to all pre-removal detention contexts in relation to the United States Constitution. The defendants respond to Aquino's reliance on *Gerstein v. Pugh*, by arguing that *Flores by Galvez-Maldonado v. Meese*, 913 F.2d 1315, 1336 (9th Cir. 1990) found that "*Gerstein* does not apply to deportation

proceedings." Docket no. 12 (quoting *Flores by Galvez-Maldonado v. Meese*, 913 F.2d 1315, 1336 (9th Cir. 1990)). The defendants also distinguish *Gerstein* and other cases cited by Aquino on several grounds.

In her Surreply, Aquino stresses that *Zadvydas* and *Demore* are not applicable to this case. According to Aquino, differences between the CNMI and the United States, and between their statutes governing detention of aliens, make these cases inapplicable. Instead, Aquino repeats that *Gerstein* is applicable, which would require a magistrate to review Aquino's detention.

2. Analysis

Aquino claims that the defendants violated her constitutional rights by her continued detention after the completion of her sentence, without review of the detention by a judge—the crux of Aquino's argument is that she believes her detention while waiting to be deported is analogous to detention following a warrantless arrest. "There can . . . be no doubt that the Due Process Clause protects immigrants as well as citizens." *Tijani v. Willis*, 430 F.3d 1241, 1244 n. 2 (9th Cir. 2005) ((citing *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) for the proposition that, "The Fifth Amendment, as well as the Fourteenth Amendment, protects every alien from deprivation of life, liberty or property without due process of law.")); *see also Demore*, 538 U.S. at 523, 123 S.Ct. at 1717 ("It is well established that the Fifth Amendment[14] entitles aliens

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[14] *See Caiozzo v. Koreman*, 581 F.3d 63, 70-71 (2nd Cir. 2009) ("We see no reason to apply a standard for due process claims brought by state detainees under the Fourteenth Amendment that is different from the one that we employ for due process claims brought by federal detainees under the Fifth Amendment." (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir.2000) ("We see no reason why the analysis should be different under the Due Process Clause of the Fifth Amendment than under the Due (continued…)

to due process of law in deportation proceedings."). The United States Supreme Court has explained:

> Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, supra, at 80, 112 S.Ct. 1780, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

Zadvydas, 533 U.S. at 690, 121 S.Ct. at 2498-2499.

Aquino's 88 day detention without a bail hearing was neither specifically provided for nor prohibited by statute. CNMI law provides: "An alien sentenced to prison shall not be deported until actual imprisonment has been terminated. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for staying deportation." 3 CMC § 4340(g); *see also* 3 CMC § 4340(f) ("If the trial court makes a determination of deportability, an order of deportation shall be entered and the respondent shall forthwith be deported."). However, Aquino had, in fact, stipulated to her deportation and the court had entered an Amended Judgment and

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[14](...continued)
Process Clause of the Fourteenth Amendment."); *Malinski v. New York*, 324 U.S. 401, 415, 65 S.Ct. 781, 89 L.Ed. 1029 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.")).

Commitment Order, which provided that Aquino was to be "immediately" deported upon the completion of her sentence of incarceration. Thus, the court must consider whether Aquino's Due Process rights were violated by the failure to deport her "immediately" upon the completion of her sentence and, absent immediate deportation, whether she was entitled to a bail hearing.

The United States Supreme Court has stated, specifically in relation to deportation of criminal aliens, that, "[d]etention during removal proceedings is a constitutionally permissible part of that process," and that INS's detention of "a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings," is similarly permissible. *Demore*, 538 U.S. at 531, 123 S.Ct. at 1721-22 (citing *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S.Ct. 977 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"); *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952); *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)). While "[t]he Court [has] held that 'a statute permitting indefinite detention of an alien would raise a serious constitutional problem,'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1114 (9th Cir. 2010) (citing *Zadvydas*, 533 U.S. at 690), the Court found that "for six months following the beginning of the removal period an alien's detention was presumptively authorized." *Id.* (citing *Zadvydas*, 533 U.S. at 701).

Aquino argues that *Zadvydas* and *Demore* are inapplicable because they are based on a provision of the United States immigration law that expressly provides a 90 day removal period, while CNMI law does not expressly authorize the detention. The statute at issue in *Zadvydas* provides, in part:

(a) Detention, release, and removal of aliens ordered removed

> (1) Removal period
>
> (A) In general[:] Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> (B) Beginning of period[:] The removal period begins on the latest of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
>
> (C) Suspension of period[:] The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.
>
> (2) Detention[:] During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(1)-(2). The *Zadvydas* Court was considering whether the statute provided the United States Attorney General authority to "detain a removable alien

indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal." *Zadvydas*, 533 U.S. at 683. The Court found that, "the statue, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." The Court, upon considering a presumptively reasonable period of detention, settled on a six month presumption. The Court explained:

> While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. *See* Juris. Statement in *United States v. Witkovich*, O.T.1956, No. 295, pp. 8-9. Consequently, for the sake of uniform administration in the federal courts, we recognize that period.

Zadvydas, 533 U.S. at 701, 121 S.Ct. at 2505. The Court's presumption was determined in relation to Congressional intent and a statute that did not govern Aquino's deportation. However, the Court's presumption was likened to other presumptively reasonable periods of detention:

> We realize that recognizing this necessary Executive leeway will often call for difficult judgments. In order to limit the occasions when courts will need to make them, we think it practically necessary to recognize some presumptively reasonable period of detention. We have adopted similar presumptions in other contexts to guide lower court determinations. *See Cheff v. Schnackenberg*, 384 U.S. 373, 379-380, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) (plurality opinion) (adopting rule, based on definition of "petty offense" in United States Code, that right to jury trial extends to all cases in which sentence of six months or greater is imposed);

> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (O'CONNOR, J.) (adopting presumption, based on lower court estimate of time needed to process arrestee, that *48-hour delay in probable-cause hearing after arrest is reasonable, hence constitutionally permissible*).

Id. at 700-01, 2504-05 (emphasis added). In fact, Aquino asks this court to find that her constitutional rights were violated because she was not brought in front of a magistrate within 48 hours of her detention. Aquino argues: "The requirement that a person being held in custody without an arrest warrant or court order authorizing the deprivation of liberty be brought before a magistrate promptly for review of the continued detention is not discretionary." Docket no. 11 (citing *Gerstein v. Pugh*, 420 U.S. 103, 124-25, 95 S.Ct. 854, 868-69, 43 L.Ed.2d 54 (1975)); "Thus, the instant case is not unlike the situation that arose in *Gorromeo v. Zachares*, 15 Fed.Appx. 555, 557 (9th Cir. 2001)."[15] *See* docket no. 11; *see also* docket no. 1 (Aquino's complaint states that she had a right to be taken before a judge within 24 hours). Aquino, though apparently acknowledging the Court's recognition of presumptively reasonable periods of detention, has identified the wrong presumption considering the facts of this case.

The court finds that, as a matter of law, Aquino's complaint does not allege a violation of Aquino's Due Process rights. The United States Supreme Court has presumed Aquino's 88 day period of detention to be reasonable, without the requirement of a bail hearing, *see Demore*, 538 U.S. at 531, 123 S.Ct. at 1721-22, and the court finds that Aquino has not alleged the violation of a constitutional right. Failure to allege the

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[15] The *Gorromeo* case concerned a plaintiff who alleged that he was detained for more than 48 hours without a probable cause hearing following his warrantless arrest. *Gorromeo*, 15 Fed.Appx. at *1.

violation of a constitutional right is fatal to Aquino's § 1983 claim. *See Pearson*, 129 S.Ct. at 815 ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Thus, Aquino's complaint does not contain facts that, "'state a claim to relief that is plausible on its face.'" *Coto Settlement,* 593 F.3d at 1034 (quoting *Iqbal*, 129 S.Ct. at 1949, 173 L.Ed.2d 868, in turn quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955, 167 L.Ed.2d 929). The court will dismiss Aquino's claim, under § 1983, as to all defendants, unless properly amended.

B. Intentional Infliction of Emotional Distress

1. Arguments of the parties

The defendants claim that pre-removal detention of up to six months does not violate an alien's Constitutional Due Process rights and, as a result, the three month detention was not "outrageous." However, the defendants also urge the court to decline to exercise supplemental jurisdiction of this claim, under 28 U.S.C. § 1367(c).

Aquino maintains that *Zadvydas* and *Demore* are inapplicable to her case, but recognizes that the court could dismiss the claim under 28 U.S.C. § 1367(c). However, Aquino argues that she could successfully reassert the claim due to the existence of complete diversity, and the requisite jurisdictional amount being at issue, in this case.

The defendants, in reply, repeat many of their arguments and emphasize that CNMI has sovereign immunity from this claim.

In her surreply, Aquino argues that CNMI elected to accept liability for this claim in CNMI Public Law 15-22.

2. Analysis

Aquino alleges that the defendants' actions were "extreme and outrageous, intended to cause plaintiff severe emotional distress, and did in fact proximately cause plaintiff severe emotional distress . . . ." Docket no. 1. The Supreme Court of the Commonwealth of the Northern Mariana Islands has explained:

> In our Commonwealth the common law is drawn from the Restatements. 7 CMC § 3401; *Castro v. Hotel Nikko Saipan*, 4 N.M.I. 268, 272, n. 5 (1995) ("In the absence of contrary statutory or customary law this Court applies the common law as expressed in the Restatements."), appeal dismissed, 96 F.3d 1259 (9th Cir.1996). The action asserted by plaintiffs is defined in the Restatement (Second) of Torts § 46 (1965) (hereinafter Restatement) as "Outrageous Conduct Causing Severe Emotional Distress," and is, in relevant part, as follows:
>
> > One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it for such bodily harm.
>
> *Id.*

Charfauros v. Board of Elections, 5 N.M.I. 188, 1998 MP 16, 1998 WL 34073646, *16-17 (N. Mariana Islands 1998) (footnotes omitted). The court also stated: "To maintain a cause of action for the intentional infliction of emotional distress requires proof of four elements: (1) that the conduct complained of was outrageous; (2) that the conduct was intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe." *Id.* (footnotes omitted) (citing *Arriola v. Insurance Company of North America*, 2 CR 113, 121 (Trial.Ct.1985), in turn citing *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 at 1273 (10th Cir.1979)).

The *Charfauros* court also described the duty of each court to "guard the gateway to the cause of action for intentional infliction of emotional distress," *id.*, by determining,

"in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id.* (quoting Restatement (Second) of Torts § 46 com. h.). The court has provided that:

> It is well established that before a claim for the intentional infliction of emotional distress raises a question of fact requiring resolution by trial, the plaintiff must set forth facts establishing the outrageousness of the conduct as a matter of law:
>
> > If courts do not in clear cases exercise their review of such claims in the first instance, the standards of outrageousness will be expanded into an unreviewable jury question, diluting the importance of the cause of action and the available relief.

Id. (citing *Keiter v. Penn Mutual Ins. Co.*, 900 F.Supp. 1339, 1348 (D.Haw.1995)). Finally, the court states: "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Id.* (citing Restatement (Second) of Torts § 46 com. h.).

In this case, this court has found that Aquino's pre-removal detention was constitutional. In so finding, this court relied on United States Supreme Court precedent creating and discussing the presumption that it is reasonable for an alien to be detained for a removal period of up to six months without a hearing. *Rodriguez*, 591 F.3d at 1114 (The Court found that "for six months following the beginning of the removal period an alien's detention was presumptively authorized.") (citing *Zadvydas*, 533 U.S. at 701). Aquino alleges that the defendants' actions in detaining her for 88 days were outrageous. Although 88 days imprisonment could certainly be considered outrageous in certain circumstances, the circumstances in this case cannot reasonably be regarded as extreme or outrageous. Instead, such detention has been found reasonable under the circumstances, for periods

twice as long as that Aquino endured. *See id.* Rather than being extreme or outrageous, the United States Supreme Court has found such detention as the ordinary period of time required to deport an alien. *See id.*

In exercising its duty to "guard the gateway," the court finds that Aquino has not plead facts sufficient for a reasonable person to find extreme or outrageous behavior and, therefore, has failed to "'state a claim to relief that is plausible on its face.'" *Coto Settlement,* 593 F.3d at 1034 (quoting *Iqbal*, 129 S.Ct. at 1949, 173 L.Ed.2d 868, in turn quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955, 167 L.Ed.2d 929). The court will dismiss Aquino's claim for Intentional Infliction of Emotional Distress, as to all defendants, unless amended as provided for below.

C. Prejudice and Leave to Amend

1. Arguments of the parties

The defendants ask the court to dismiss Aquino's claims in their entirety. If the court dismisses Aquino's claims, she argues that it would be a result of the defendants' technical objections and that she would be able to cure any deficiencies by amending her complaint.

2. Analysis

"Fed.R.Civ.P. 15(a) provides, *inter alia*, that 'a party may amend his [or her] pleading once as a matter of course at any time before a responsive pleading is served. . . .'" *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The Ninth Circuit Court of Appeals has explained, "'[a] motion to dismiss is not a "responsive pleading" within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper. . . .'" *Id.* (citing

Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984), in turn quoting *Breier v. Northern California Bowling Proprietors' Association*, 316 F.2d 787, 789 (9th Cir.1963)). "If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Id.* (citing *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir.1962)); *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) ("'Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment.'") (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir.2002), in turn quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991)). In addition, "[c]ourts are free to grant a party leave to amend whenever 'justice so requires,' Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001), in turn quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)).

Aquino is entitled to amend her complaint as a matter of course, as a responsive pleading has not yet been served. *See Schreiber Distributing Co.*, 806 F.2d at 1401 (citations omitted). Although the court will dismiss Aquino's claims for failing to properly plead her claims, it will not dismiss the claims with prejudice as it is possible—though the court thinks unlikely—that she could amend her complaint to successfully assert a claim under § 1983 or a claim of intentional infliction of emotional distress. *See Id.* ("leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency") (citations omitted). Therefore, the court will not dismiss Aquino's claims with prejudice but, instead, grants her leave to amend the claims.

IV. CONCLUSION

For the above reasons, the court **grants** the defendants' Motions to Dismiss (docket nos. 4 and 5) and grants Plaintiff Yu Hua Jin Aquino **leave to amend** the claims under § 1983 and for Intentional Infliction of Emotional Distress[16] in her Complaint (docket no. 1). If Aquino fails to amend her Complaint within ninety days, her Complaint (docket no. 1) shall be **dismissed in its entirety without prejudice**.

IT IS SO ORDERED.

DATED this 27th day of May, 2010.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE[17]

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[16] Aquino's second and fourth causes of action, for punitive damages and attorney fees, are not independent of her first and third causes of action, under § 1983 and for Intentional Infliction of Emotional Distress.

[17] Chief United States District Court Judge Alex R. Munson of the District of the Northern Mariana Islands stepped down as an active judge on February 28, 2010, and is now a senior judge. Like several other United States District Court judges from around the nation, I sat as a visiting judge in Saipan—in my case, for two weeks in mid-April—to assist with the timely processing of court business until a successor to Chief Judge Munson is appointed.